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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. BERNELL FLORENZ BUTLER, JR., Defendant and Appellant.	E053057 (Super.Ct.No. RIF149296) OPINION

APPEAL from the Superior Court of Riverside County. Bernard Schwartz, Judge. Affirmed.

Harry Zimmerman, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Barry Carlton, Garrett Beaumont, and Laura A. Glennon, Deputy Attorneys General, for Plaintiff and Respondent.

I

INTRODUCTION

Defendant Bernell Florenz Butler, Jr. denies participating in armed robbery and

burglary. Although defendant was implicated by his coparticipant, Cainen Chambers, defendant's primary argument is he was misidentified by the witnesses. Nevertheless, a jury convicted defendant of two counts of robbery, two counts of burglary of a truck and trailer, and two counts of assault with a firearm, including enhancements that defendant personally used a firearm and personally and intentionally discharged a firearm. (Pen. Code, §§ 211, 245, 459, 12022.5, subd. (a), and 12022.53, subds. (b) and (c).)[1] The court sentenced defendant to a total prison term of 32 years.

On appeal, defendant asserts claims of ineffective assistance of counsel (IAC), evidentiary error, insufficiency of evidence, cruel and unusual punishment, and cumulative error. We reject all of defendant's contentions and affirm the judgment.

II

FACTUAL BACKGROUND

A. The Robbery

Donovan Horton owns a concrete company, which he operates on one-half of a commercial yard in Corona near Mayhew Street and Temescal Canyon Road. Horton rents the other half of the yard for people to park their trucks and trailers. The yard is kept locked. Horton sometimes has thousands of dollars on the premises from deliveries. Defendant had once worked for Horton loading trucks. Horton identified defendant in a photographic lineup.

About 1:35 p.m. on October 1, 2007, two brothers, Douglas Dilliard and Jerome

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[1] All statutory references are to the Penal Code unless stated otherwise.

Dilliard, were working in the yard on the truck they used in their tree-trimming and removal business. Two Black men approached and asked for "Donny." Douglas thought one of the men was about 6 feet 2 or 3 inches tall, and thin or lanky. Jerome estimated he was 6 feet 8 inches tall.[2] The second man was shorter and stockier. The taller man wore a Halloween mask on the top of his head, covering his forehead but not his face, a black jacket, and jeans. Douglas recognized defendant as Horton's former employee and identified defendant in court as the taller man.

Douglas told the men Horton was not on the premises. Defendant, whose right hand had been covered by a handkerchief, pointed at Douglas, revealing a black nine-millimeter semiautomatic gun. The shorter man had a revolver. Defendant directed the two brothers to get on the ground and again asked about Horton. While keeping the guns pointed at the brothers, the men searched them for cash and took Jerome's wallet and the brothers' cell phones.

While the shorter man guarded the brothers, who were face down on the ground, defendant went to another part of the yard, walking between some trucks and near a white trailer. When the shorter man wandered off to check on defendant, the brothers heard glass breaking, followed by gunshots coming from defendant's direction. The brothers seized the chance to escape, jumping in a service truck, and driving away. At the gate to the yard, Douglas saw a girl sitting in a parked car. When they reached Temescal Canyon Road, the brothers asked a crew working there to call the police.

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[2] The arrest warrant described defendant as being 6 feet 4 inches tall, weighing 155 pounds.

Douglas identified the shorter man in a photographic lineup but not defendant. Jerome could not identify anyone accurately.

B. The Damage to the Trailer and the Truck and the Bloody Newspaper

Eric Coe owned the white trailer parked in the yard. After the police called to report the trailer had been damaged, Coe found the trailer's windows were broken. Inside the trailer was a large rock. The trailer had been ransacked and its contents strewn about. The cost of the damage was about $2,100.

Joel Glentz, a cement truck driver, also parked his truck in the yard. After the police reported to Glentz that the truck had been damaged, he found a window broken and the truck's contents disturbed. A rock was inside the truck. The seat, the window, and the console had been penetrated by gunfire. Glentz also found an embedded bullet fragment.

Kevin Whitford, a deputy sheriff, had returned to the yard with the brothers. He found Coe's truck had been damaged by gunfire and the white trailer had been vandalized. Whitford discovered a nine-millimeter casing near the truck. Inside the trailer was a newspaper smeared with fresh blood.

When Horton inspected the white trailer, he saw blood stains on a bedspread and on a newspaper, the October 1, 2007, edition of the Riverside Press Enterprise. Horton called the police who came out and collected the blood-stained newspaper. Whitford gave the newspaper to an investigator, Wyatt McElvain, in an open brown paper bag. McElvain booked the newspaper into evidence. Two years later a positive match was made between defendant's DNA and the DNA of the blood on the newspaper.

C. Statements and Testimony by Cainen Chambers

About four hours after the robbery, the Riverside police stopped a silver Chevrolet Cavalier owned by Cainen Chambers. His passenger was Edward Forney, who was 6 feet 5 inches tall and weighed about 205 pounds.

Chambers's car had a hidden compartment containing a .32-caliber revolver with two chambered spent shell casings. Chambers told police that he and defendant, aided by Tenaya Burnett, Chambers's girlfriend, had been involved in a robbery planned by defendant. Chambers volunteered the gun found in his car belonged to Burnett, not to him. Chambers had possession of the gun during the robbery but had not removed it from his pocket. Chambers said defendant also had a gun during the robbery. Chambers claimed he had allowed the Dilliard brothers to escape.

Drugs and paraphernalia were also found in the car. Chambers took police to a freeway entrance where they found a piece of newspaper that had been used to obscure the car's rear license plate during the robbery and burglary.

When a sheriff's investigator interviewed Chambers in jail, Chambers identified defendant in a photographic lineup. Chambers told the investigator defendant had planned the robbery and forced Chambers to participate by threatening his family. Chambers had been armed with a .32-caliber semiautomatic and defendant had a black nine-millimeter Beretta.

McElvain also interviewed Chambers, who expressed concern about being a "snitch." Chambers said defendant had planned the robbery, driving Chambers past the yard where defendant used to work and telling Chambers there was cash on the premises.

Defendant was hoping to obtain $10,000. Defendant also discussed kidnapping the victims.

Chambers explained to McElvain that, in order to execute the robbery, Chambers used the newspaper to cover his car's license plate. Defendant wore a mask on the top of his head. Defendant was armed with the Beretta. Chambers was armed with the revolver. Defendant's girlfriend brought them to the site and waited in the car. Defendant ordered the Dilliard brothers to get on the ground and Chambers to search their pockets and wallets. Defendant took the cell phones to stop the brothers from calling the police.

Chambers described how defendant had smashed the trailer window and hurt his head breaking into the truck when the rock boomeranged and struck him. Defendant also cut his hand and neck. A bloody newspaper was left at the scene. Chambers and defendant removed the other newspaper from the license plate before getting on the freeway.

When Chambers testified, he denied knowing defendant except having met him in church briefly. He disclaimed any memory of October 1, 2007, the statements he made to law enforcement, or entering a plea of guilty for two counts of robbery and going to prison for the crime. Chambers claimed to have problems with his memory, aggravated by drug use. He acknowledged he was afraid to testify at trial about his past statements.

III

THE ALIBI WITNESS AND IAC

In a motion for new trial, defendant asserted his trial counsel was constitutionally

ineffective for failing to investigate a potential alibi witness, Karen Wilson Cross, a friend of defendant's mother. According to Cross's declaration, she would have testified that Chambers and defendant came to her home on October 1, 2007, at approximately 11:00 a.m. Defendant had cut his hand badly and Cross washed and bandaged it. Defendant stayed at her house until 4:00 or 5:00 p.m. the next day when his mother picked him up. Cross repeatedly told defendant she would testify on his behalf but she was never contacted by anyone.

We agree with the People that the facts, as determined by the trial court, do not support a conclusion that defendant's trial counsel's performance was prejudicially deficient for failure to investigate. (*Strickland v. Washington* (1984) 466 U.S. 668; *In re Thomas* (2006) 37 Cal.4th 1249, 1256, 1263-1265.) First, defendant cannot establish that defendant's trial lawyer acted unreasonably. The trial court found that defendant's trial lawyer did not have the means to locate or to contact Cross. Among other reasons, the trial lawyer was not provided with Cross's telephone number, although he requested it and it must have been known to defendant or his mother, Cross's friend. Although there was contrary evidence in the record, substantial evidence supported the ruling of the trial court.

Second, the trial court found that, in view of the DNA evidence and Chambers's statements and testimony, it is not reasonably probable that Cross's testimony would have resulted in a different verdict. Defendant speculates that the alibi could have created doubt about whether the newspaper and DNA evidence could have been planted or manipulated. Defendant also hypothesizes the alibi could have undermined Douglas's

in-court identification of defendant, whom Douglas also recognized at the time of the robbery, but whom Douglas could not identify from a photographic lineup. We reject defendant's strained efforts to demonstrate prejudice. If defendant had gone to Cross's house for treatment at a later time than she stated, he could have left the bloody newspaper in the trailer. As we discuss below in section V the chain of custody for the newspaper was established. Additionally, it is entirely plausible Douglas could recognize and identify defendant more easily in person than from a photograph. Under these circumstances, we disagree that defendant's trial counsel needed to conduct an investigation of the alibi offered by Cross. The strength of the prosecution's case was much stronger than any testimony from Cross. (*In re Thomas, supra,* 37 Cal.4th at p. 1265.)

IV

THIRD-PARTY CULPABILITY

On appeal, defendant argues that the trial court abused its discretion by excluding evidence that Edward Forney, Chamber's passenger when his car was stopped four hours after the robbery, was the taller robber not defendant. Defendant asserts the court misapplied the principles applied to the admission of evidence of third-party culpability as discussed in *People v. Hall* (1986) 41 Cal.3d 826.

The first difficulty with defendant's argument is that defendant's trial counsel forfeited any such issue by expressly denying that he was seeking to introduce evidence of third-party culpability. Instead, trial counsel insisted he wanted only to establish the inadequacy of the police investigation:

"I'm not trying to introduce any evidence that there is a third party . . . . [¶] . . . [¶] . . . there was someone in the car who fit a general description that someone is taller than Mr. Chambers [*sic*] . . . I have no idea . . . whether or not Edward Forney was involved in the robbery. I'm not saying he was. It's simply something that should have been investigated, and it wasn't. That's all I'm seeking. That's all I'm asking. [¶] . . . It's something that was there, that should have been investigated, and it wasn't. [¶] . . . [¶] . . . It is simply an investigatory step that was not taken and, perhaps, reasonable people could agree that it should have been taken, and it wasn't. It's as simple as that."[3]

Defendant acknowledges in his appellate brief that "The Supreme Court has found a third-party culpability claim forfeited when trial counsel only argued that he was eliciting the evidence to show the 'inadequacy of the police investigation.' (*People v. Panah* (2005) 35 Cal.4th 395, 481.)" Forfeiture is exactly what occurred in this case.

The second problem with defendant's claim is that there is no evidence of third-party culpability. The *Hall* court held:

"To be admissible, the third-party evidence need not show 'substantial proof of a probability' that the third person committed the act; it need only be capable of raising a reasonable doubt of defendant's guilt. At the same time, we do not require that any evidence, however remote, must be admitted to show a third party's possible culpability. As this court observed in [*People v. Mendez* (1924) 193 Cal. 39], evidence of mere motive or opportunity to commit the crime in another person, without more, will not

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[3] Defendant concedes that "Trial counsel's actions belied his words."

suffice to raise a reasonable doubt about a defendant's guilt: there must be direct or circumstantial evidence linking the third person to the actual perpetration of the crime." (*People v. Hall, supra*, 41 Cal.3d at p. 833.)

In the *Hall* case, after the prosecution rested, the defendant made an offer of proof to show that the victim "was more likely murdered by a teenage neighbor who had been seen victimizing him in the past, or by Foust [a witness] himself. Defendant intended to base his theory of Foust's culpability on the latter's knowledge of intimate details of the murder not mentioned by defendant; on the fact that the victim's hyoid bone was broken on the left side, although defendant is right-handed; and on the proposed testimony of Foust's estranged wife that he is left-handed, is violent when drunk, and has a history as a police informant. She would further testify that Foust had never spoken of a meeting with defendant or expressed fear of him, and was 'virtually tantamount to a pathological liar.' Defendant would also attempt to prove that Foust's motive for bringing the murder to the attention of police was to avoid prosecution for forgery." (*People v. Hall, supra* 41 Cal.3d at p. 830.)

No such detailed offer of proof to support defendant's claim of third-party culpability has been proffered here. Edward Forney was a tall Black man who was in the car with Chambers four hours after the robbery. But Chambers said defendant planned and executed the robbery and Douglas recognized defendant at the time of the robbery and identified him in court. No witness implicated Forney. The DNA from the bloody newspaper found in the trailer matched defendant's DNA. In summary, there was no direct or circumstantial evidence linking Forney to the actual perpetration of the crime.

(*People v. Hall, supra,* 41 Cal.3d at p. 833.) The trial court did not abuse its discretion in precluding evidence of third-party culpability. (*People v. Prince* (2007) 40 Cal.4th 1179, 1242-1243.)

V

CHAIN OF CUSTODY FOR THE BLOOD-STAINED NEWSPAPER

On appeal, defendant challenges the chain of custody for the blood-stained newspaper. At trial, defendant failed to raise an objection on that basis, meaning he has forfeited the right to raise the issue on appeal. (Evid. Code, § 353, subd. (a); *People v. Doolin* (2009) 45 Cal.4th 390, 434.) Notwithstanding, defendant's failure to preserve the issue, it has no merit.

In a chain of custody claim, defendant has the burden of showing, it is reasonably certain that there was no alteration in the evidence: "'The requirement of reasonable certainty is not met when some vital link in the chain of possession is not accounted for, because then it is as likely as not that the evidence analyzed was not the evidence originally received. Left to such speculation the court must exclude the evidence. [Citations.] Conversely, when it is the barest speculation that there was tampering, it is proper to admit the evidence and let what doubt remains go to its weight." [Citations.]' ([*People v. Diaz* (1992) Cal.4th 495,] 559; see also Mendez, Cal. Evidence (1993) § 13.05, p. 237 ['While a perfect chain of custody is desirable, gaps will not result in the exclusion of the evidence, so long as the links offered connect the evidence with the case and raise no serious questions of tampering'].) The trial court's exercise of discretion in admitting the evidence is reviewed on appeal for abuse of discretion. (*County of Sonoma*

v. Grant W. (1986) 187 Cal.App.3d 1439, 1448." (*People v. Catlin* (2001) 26 Cal.4th 81, 134.)

In this case, the bloody newspaper was first discovered by Deputy Whitford in the ransacked trailer when the fresh blood was still red. The newspaper was not removed from the scene by forensic technicians on the day of the crime but Horton, the owner of the yard, noticed the newspaper later and notified detective McElvain. The newspaper was photographed in the trailer and Whitford placed it in a brown paper bag and delivered it to McElvain who booked it into evidence. The newspaper was handled subsequently by a forensic technician and two criminalists. There are no gaps in the chain of custody raising any reasonable questions about tampering. Therefore, it would not have been an abuse of discretion for the trial court to admit the evidence had defendant objected.

VI

SUFFICIENCY OF EVIDENCE

Defendant next argues there was insufficient evidence to support the enhancement for personally and intentionally discharging a firearm. (§ 12022.53, subd. (c).) Defendant does not argue that he did not discharge a gun. Instead, he reasons that he did not discharge a firearm in the course of robbery of the Dilliard brothers but only as an aid to the later burglary. (*People v. Masbruch* (1996) 13 Cal.4th 1001, 1012-1013.) In other words, "[t]he elements of the robbery had been completed, and a personal use of the firearm satisfied, before the tall robber moved away from the Dilliard brothers to begin breaking into the vehicles at the yard." When defendant fired his gun it was to break into

the truck and trailer after he had already taken the cell phones and wallet.

Defendant acknowledges that robbery is "a continuing offense that concludes not just when all the elements have been satisfied but when the robber reaches a place of relative safety." (*People v. Carrasco* (2006) 137 Cal.App.4th 1050, 1059.) A discharge of a gun before, during, or after the felonious act may be sufficient if the discharge and the act are part of a continuous transaction. (*People v. Frausto* (2009) 180 Cal.App.4th 890, 902.) Defendant contends the shooting occurred after the robbery while the Dilliard brothers were escaping and that there was no evidence of defendant shooting at them or intending to intimidate them as part of the robbery.

The standard of review requires us to evaluate the record as a whole in the light most favorable to the judgment. (*People v. Farnam* (2002) 28 Cal.4th 107, 143.) Defendant and Chambers robbed the Dilliard brothers at gunpoint and forced them to lie on the ground under guard by Chambers while defendant ransacked the vehicles. Defendant fired his weapon while the brothers were still on the ground and being guarded by Chambers. Even though the brothers were able to escape while Chambers was distracted, substantial evidence shows that defendant personally and intentionally discharged a firearm as part of a continuous transaction that included the two robberies. Defendant did so before he and Chambers drove away from the crime scene and reached a place of relative safety. Sufficient evidence establishes that the robbery of the Dilliards and the burglary of the truck and trailer were a continuous transaction and the enhancement was proper.

VII

CRUEL AND UNUSUAL PUNISHMENT

In a new argument on appeal, defendant challenges his sentence of 32 years to life as cruel and unusual under federal and state Constitutions, even though he acknowledges that the three-year sentence received by Chambers and the 36 months of probation imposed on Burnett are irrelevant. (*People v Jennings* (2010) 50 Cal.4th 616, 686.) Defendant's claim was forfeited by not raising it below. (*People v. Ferrel* (1972) 25 Cal.App.3d 970, 976.) Furthermore, as a reviewing court, we must uphold the judgment if it is supported by substantial evidence: "'Whether a punishment is cruel or unusual is a question of law for the appellate court, but the underlying disputed facts must be viewed in the light most favorable to the judgment.' [Citations.]" (*People v. Sullivan* (2007) 151 Cal.App.4th 524, 569.)

Defendant argues there is insufficient evidence of him playing a greater role in the crimes and his criminal record and personal history do not support the severity of the sentence. Although the trial court did not make express findings on the issue of cruel and unusual punishment, the record does offer the relevant information that defendant planned and executed the robbery, terrorized the Dilliard brothers, gave orders to Chambers, and wielded and fired a gun while vandalizing the truck and trailer. The trial court found the crimes at issue involved the destruction of property and financial damages and were accomplished with planning, sophistication, and professionalism and the use of a weapon and force or violence. (Cal. Rules of Court, rule 4.421(a)(1), (2) & (8).) Additionally, defendant's criminal history includes felony domestic violence,

probation violations, and two separate attempted second degree burglaries. (Cal. Rules of Court, rule 4.421(b)(1), (2), (3) & (5).

Defendant has not shown that, under the Eighth Amendment, his punishment was grossly disproportionate to the severity of his crimes, considering the factors of the gravity of the offenses and the harshness of the penalty and the sentences imposed on criminals in the same jurisdictions or other jurisdictions. (*Ewing v. California* (2003) 538 U.S. 11, 20-21.) Defendant also has not shown the sentence was cruel or unusual under the California Constitution because it shocks the conscience and offends fundamental notions of human dignity, considering the nature of the offense or the offender and a comparison with punishments for different, more serious offenses in the same or other jurisdictions. (*In re Lynch* (1972) 8 Cal.3d 410, 424-425.) In light of the foregoing, defendant's sentence is not cruel or unusual punishment under constitutional standards.

VIII

DISPOSITION

We reject defendant's claims for IAC, evidentiary error, insufficiency of evidence, and cruel and unusual punishment, In the absence of any error there is no cumulative error. We affirm the judgment.

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CODRINGTON
J.

We concur:

McKINSTER
Acting P. J.

RICHLI
J.